arise out of the use of the land but does not *arise out of the land itself.* As *Megarry and Wade* have pointed out in their 2nd Edition of the *Law of Real Property* at page 785 —

"A profit *a prendre* has been described as 'a right to take something off another person's land.' This it is, but not all such rights are profits. If the right is to be a profit, the thing taken must be either part of the land, e.g., minerals or crops, or the wild animals existing on it; and the thing taken must at the time of taking be susceptible of ownership. A right to 'hawk, hunt, fish and fowl' may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned. But a right to take water from a spring or a pump, or the right to water cattle at a pond, may be an easement but cannot be a profit; for the water, when taken, was not owned by anyone nor was it part of the soil."

It is clear that the right to collect admission fees and licence fees in respect of the land in question does not fall within any of the known categories of profits *a prendre* because no right to take anything out of the said land is given to the licensee. What he is entitled to do is to collect these fees and thereby to make a profit for himself in the lay sense of the term. He does not take anything out of the land itself. As *Stroud's* Judicial Dictionary of Words and Phrases, 3rd Edition, page 2324, succinctly provides —

" 'The profit must be something out of the land itself,' as distinguished from making a profit by the use of the land; 'and it is because it is something out of the land itself that a LICENCE to a profit *a prendre* has been held to be within the Statute of Frauds as being an interest in land,' e.g. to hunt or shoot game and take it away."

I find, therefore, that the agreement does not confer any licence to a profit *a prendre* on the licensee. It should be noted that even a licence to a profit *a prendre* may not necessarily give the licensee exclusive possession of the land. It is only if he does get such exclusive possession that any question of the licence being construed to be a lease will arise. In the circumstances of the present case both factors are missing, i.e. no profit of the nature of a profit *a prendre* is conferred on the licensee and, as I have found earlier, no exclusive possession of the said land and premises has been conferred on the licensee.

In view of my findings above I do not think that I need deal with such fascinating cases as were cited, involving the sale of refreshments at a theatre (*Frank Warr & Co. Ltd.* v. *London County Council,*[7]) the front of the house rights of a theatre (*Clore* v. *Theatrical Properties Ltd., & Westby & Co. Ltd.,*[8]) where the rights conferred were held to evidence a licence and nothing else in each case.

In conclusion I should like to add that the licensee, Goh Eng Wah, has categorically affirmed that so far as he is concerned the agreement constitutes a mere licence and in no way creates a tenancy in his favour of the said land and premises and has consented to the respondents' application for approval of the agreement by the court.

Where the intention of the parties is clear not only from the document itself but from their conduct and the surrounding circumstances it would, as *Megarry* points out at page 52 in the 9th Edition of his Rent Acts, be wrong for the court to extract from the grantor an estate or interest in land in the teeth of such intention.

The appeal is, therefore, dismissed.

Tan Ah Tah F.J.: I agree.

Chua J.: I agree.

Appeal dismissed.

Solicitors: *Philip Hoalim & Co.; Mallal & Namazie.*

BRITISH AND MALAYAN TRUSTEEES LTD. v. ABDUL JABBAR & ANOR. AND KADER MAIDEEN & ANOR.

[O.C.J. (Winslow J.) March 23, 1966]

[Singapore — Consolidated Suits No. 677 of 1963 and No. 1216 of 1963]

Landlord and Tenant — Space in pillar in common passageway — Agreement of tenancy — Whether creates licence or tenancy — Termination.

By a written agreement, the defendant was granted a monthly tenancy of premises described as "second pillar on the right hand side of the arcade from the entrance from Raffles Place, 6 feet high, 4 feet wide and 8 inches depth". The plaintiffs claimed a declaration that the right of the defendant had been determined.

Held: the agreement, notwithstanding that it was on a printed form used for tenancies and described the parties as landlord and tenant, did not create a tenancy but a contractual licence terminable by one month's notice in writing given by other party.

Cases referred to:—

(1) *Commissioners of Customs and Excise* v. *Poole Finance* [1952] 1 T.L.R. 793.

(2) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386.

(3) *Rendell* v. *Roman & Anor.* (1893), 9 T.L.R. 192.

(4) *Hancock* v. *Austin* 14 C.B.N.S.; 143 E.R. 593.

CIVIL SUITS.

D. G. Ironside for the plaintiffs.

J. Tan Chor Yong for the defendant.

Cur. Adv. Vult.

Winslow J.: The plaintiffs apply, in this consolidated action, for a declaration that the right of the defendants in Suit No. 677 of 1963 to use a space in the common passageway in the Arcade has been determined and also for an injunction to restrain the defendants in both Suits from continuing to use a space 9 feet high, 14 feet 8 inches wide and 4 feet 8 inches deep

in the same common passageway for their business.

Counsel for the defendants conceded that Abdul Rahim, the second defendant in Suit No. 677 of 1963 is the same person as Kader Maideen son of Abdul Rahim, the first defendant in Suit No. 1216 of 1963 and it is with this gentleman's claim to be a tenant of the plaintiffs and thereby entitled to the protection of the Control of Rent Ordinance (Cap. 242) that I am primarily concerned.

The first defendant, Abdul Jabbar, in Suit No. 677 of 1963 did not enter an appearance and I finalised the interlocutory judgment against him, at the hearing. It also appears that the second defendant, Hamid bin Kader also known as K.S.A. Hamid, in Suit No. 1216 of 1963, is a mere employee of Abdul Rahim and has no interest in the suit. It is, however, common ground that he was in occupation of the disputed space at the time of the institution of the proceedings against him when Abdul Rahim was away in India. I would, therefore, dismiss the claim against him without making any order as to costs.

I now, therefore, turn to consider the legal position of the only remaining defendant, Abdul Rahim (hereinafter referred to as "the defendant"). The facts are that one of the former trustees of the Settlements of Syed Shaikh Alkaff deceased (hereinafter referred to as "the Settlements") entered into an agreement, on one of their usual printed forms for tenancy agreements, with him on 26th August, 1958, granting him a "monthly tenancy" at the "rent" of $40 per month in respect of the "tenancy" of premises described as "second pillar on the right hand side of the Arcade from the entrance from Raffles Place, 6 feet high, 4 feet wide and 8 inches depth". The agreement provides that the tenancy may be determined by either party by one month's notice in writing given to the other party. It is also provided by clause (h) of paragraph 2 that no new tenancy agreement relating to the said premises will be made or recognised as having been made on the termination of the existing tenancy save by the due execution of such a new tenancy agreement on the landlords' printed form of tenancy agreement then in current use.

There is no evidence of the execution of any new tenancy agreement and the only agreement which I have, therefore, to construe is the agreement of 26th August, 1958 in order to decide whether it creates a valid tenancy or merely confers a licence on the defendant in respect of the space described therein.

The Arcade, as everyone knows, is a covered walk or passageway running in a seaward direction from Raffles Place at one end to Collyer Quay at the other. There are gates at either end which are closed during the greater part of the night. The trustees have always had a watchman to look after it and to open and shut these gates so as to allow access to it during the day to the public and occupiers. The evidence is to the effect that, on going into occupation of a space adjoining the second pillar on the right from Raffles Place, the defendant moved an almeirah into a space against a wall on the right as one looks at it from Raffles Place, on the other side of which wall are premises occupied by Cold Storage Arcade.

In 1961, extensions were made to the space occupied by the defendant and he, thereafter, proceeded to occupy a space 9 feet high, 14 feet 8 inches wide and 4 feet 8 inches deep. This was apparently done with the approval of one of the trustees of the Settlements, S.A.A. Alkaff, the trustee who originally executed the agreement of 26th August, 1958 although other trustees complained that he had exceeded his rights with regard to the agreement. According to the defendant, the said S.A.A. Alkaff, in 1958, originally pointed out the space which the defendant was to occupy next to the second pillar by indicating it with his feet and the defendant claimed in evidence that he took this to mean all the space extending from the second pillar on the right to the third pillar on the right which is, of course, a far larger space than that indicated in the agreement.

Counsel for the plaintiffs, who are the present trustees under an order of court dated 26th July, 1962 submitted that there were two questions for me to decide —

(i) What was the nature of the actual agreement — a licence or a lease?

(ii) Did the defendant have a right to move beyond the space provided in this agreement?

It is clear that the defendant has, at least since 1961, "built himself in" on the right hand side of the Arcade next to the second pillar in the manner shown on Exhibit D.1 which is a plan showing the erection of shelves and showcases used by the defendant. A Temporary Permit No. 49 of 1962 was issued to him by the then City Council for this. Exhibit D.1 contains the signature of S.A.A. Alkaff as trustee of the Settlements, as owner of the site in question. Counsel for the defendant contends that, by virtue of this approval, the present trustees are bound to recognise the defendant as their tenant of the whole of the space set out in this exhibit. On the other hand, the plaintiffs, who are the present trustees, contend that the said S.A.A. Alkaff had no authority so to bind the trustees, particularly in the absence of a fresh tenancy

agreement concluded on the usual printed form used by the trustees in accordance with clause (h).

In my opinion the agreement of 1958, notwithstanding the fact that it is on a printed form used for tenancies and describes the parties as landlord and tenant, does not create a tenancy at all but only a contractual licence terminable by one month's notice in writing given by either party for the following reasons:—

(i) The intention of the parties to the agreement must be sought not from the mere words of their contract but its substance and the conduct of the parties and the surrounding circumstances can be scrutinised in order to determine whether or not all that was intended was that the occupier should be granted a personal privilege with no interest in the land. The relationship of the parties is determined by the law and not by the label which they choose to put on it (see *Commissioners of Customs and Excise* v. *Poole Finance.*[1] Lord Justice Denning reiterates this proposition in *Facchini* v. *Bryson.*[2] There are numerous other authorities for the proposition that that which is called a lease may only amount to a licence and that a so-called licence may well be construed to create a lease.

(ii) The space "let out" to the defendant is not demarcated with that precision which one would expect to find in a lease and I am in considerable doubt about the exact situation of the space in question. According to the defendant himself some space was pointed out to him by S.A.A. Alkaff with his feet. Whilst appreciating the defendant's candour in this respect, I must say that anyone who expects to acquire a lease by this means must be an optimist. The agreement itself mentions "the second pillar on the right hand side of the Arcade from the entrance from Raffles Place. Size of premises 6 feet high, 4 feet wide and 8 inches depth". In my opinion it would be a clear abuse of language to regard this description as being at all adequate for the purpose of a lease.

(iii) The control of the entire Arcade lay at all times and still lies with the trustees who employed and still employ their own watchman to guard the entire passageway. It seems to me quite clear from the evidence and from the agreement that all that was intended by the parties was that the defendant should be permitted to use, for the purposes of his business, a space 6 feet high, 4 feet wide and 8 inches deep at the second pillar in the common passageway during the hours when the gates were kept open and nothing more. To regard such an agreement as conferring, on the defendant, exclusive possession of any particular space in the Arcade would, in my opinion, be a grave departure from the use of common sense. The description and dimensions shown on the agreement are consonant with a permissive occupation during business hours of some air-space located vaguely at the second pillar but, where exactly, no one knows. The case of *Rendell* v. *Roman & Anor.*[3] where the defendants let to one W a stall at an exhibition at a weekly rent, but W was not to use it before 10 a.m. nor after 11 p.m. is apposite. It was there held that only a mere licence was conferred. In the present case, the defendant was not even allocated a stall.

(iv) The "rent" of $40 per month admittedly includes an element for the use of electric power supplied by the trustees. In the case of *Hancock* v. *Austin*[4] the owner of a factory was in the habit of letting "standings" therein for lace-machines, himself supplying the power for working them. It was held in that case that there was no right to distrain for rent for so much of the floor as the machines stood on and Williams J. was clearly of opinion that the facts did not disclose a demise of the floor. The defendant in the present case was clearly granted, at the most, the use of only "standing room" on the side of the passageway to sell his wares at "the second pillar".

On the whole I am of the opinion that the law is overwhelmingly in favour of the plaintiffs' contention and I would, therefore, allow the plaintiffs' claim with costs against this defendant.

I am not disposed to view the claim by the plaintiffs for damages, in respect of the defendant's over-stay at the site since the expiry of the notice to quit, with any particular favour. I think that the former trustee who granted these so-called "tenancies" to way-side "hawkers" at what appears to be additional premia personal to himself has contributed to their unsavoury position for which damages against them would be unjust in all the circumstances. Gratitude for the service done to the public by the trustees in clearing the Arcade of obstructive occupiers of the passageway should be their sufficient reward.

Claim allowed.

Solicitors: *Ironside & de Souza; J. Tan Chor-Yong & Co.*

KHALIK v. THAI CRAFT LTD.

[O.C.J. (Chua J.) March 23, 1965]

[Singapore — Suit No. 1135 of 1962]

Landlord and Tenant — Premises let to person carrying on business with another person as partner — Acceptance of partners as tenants — Partners allowing company in which they are shareholders to occupy premises as licencees — Claim for possession — Tenancy not lawfully terminated — Landlord cannot maintain action for trespass against persons in occupation by